92-1109

No. _____

Supreme Court, U.S.
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In The

Supreme Court of The United States

Term.

MAXINE AND HORACE JOHNSTON,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

IF LOCAL PROPERTY LAW PROVIDES THAT ONE CLAIMING TITLE TO REAL ESTATE AS AGAINST THE FEE SIMPLE OWNER THEREOF HAS THE BURDEN OF PROVING THE SUPERIORITY OF THEIR INTEREST, DOES THE PROOF OF SUCH FEE SIMPLE INTEREST BY INNOCENT THIRD-PARTY PETITIONERS UNDER 18 U.S.C. SECTION 853(n)(6) THEN SHIFT TO THE GOVERNMENT THE BURDEN OF PROVING AN INTEREST SUPERIOR THERETO BY THE GOVERNMENT?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

MAXINE AND HORACE JOHNSTON,

Petitioners

v.

STATE OF OHIO,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Maxine and Horace Johnston, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit Court of Appeals affirmed the District Court of the United States, Southern District of Ohio, Eastern Division. A copy of the Court's entry appears in the Appendix to the Petition at A-1. A copy of the District Court's finding is attached in the Appendix at A-2. The Sixth Circuit denied petitioners a rehearing. A copy of the Court's entry is in the Appendix at A-3.

JURISDICTION

The judgment of the Court of Appeals of the Sixth Appellate Judicial District of Ohio, Franklin County, Ohio, was entered on July 14, 1992, with the rehearing denied on September 28, 1992, and this petition was timely filed within ninety (90) days of that date.

This Court's jurisdiction is invoked

under 28 U.S.C. Sec. 1254(1), and Supreme Court Rule 10.1 (a) and (c).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States which provides, in pertinent part:

FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The petitioners, Horace and Maxine Johnston, are the parents of the defendant in the underlying criminal case, Robin Warner.

On May 18, 1990, Robin Warner was

convicted in the U.S. District Court for the Southern District of Ohio, Eastern Division, of several narcotics-related counts. On May 21, 1990, special verdicts forfeited the interest of Warner in two automobiles and three pieces of real estate, including that at 2128 Leonard Avenue, Columbus, Ohio, known as Wildwood Florist Shop. The District Court entered said findings on August 9, 1990.

Pursuant to 21 U.S.C. Section 853(n)(1), the United States published Notice of the Order of Forfeiture. On September 10, 1990, petitioners filed their third-party claims with respect to two of said real properties, including Wildwood.

On August 8, 1991, a hearing upon petitioners' claims was held in the District Court. Subject matter jurisdiction was vested in the District Court by Title 21, United States Code, Section 853, governing forfeiture proceedings in federal criminal

cases, and particularly by Subsections 853(n)(1) and 853(n)(6). By order of September 5, 1991, the Court denied the third-party claims and entered a final order of forfeiture. (Appendix A-2).

Petitioners filed their timely Notice of Appeal to the United States Court of Appeals for the Sixth Circuit and obtained a stay of execution as to the Leonard Avenue property. On July 14, 1992 the United States Court of Appeals for the Sixth Circuit affirmed the District Court's decision to forfeit the Leonard Avenue property. The Court acknowledged that the petitioners held the fee simple absolute deed to the property, however, the Court affirmed on the ground that the petitioners failed to satisfy the burden imposed on them by 21 U.S.C. Section 853; that is, to prove that they have a superior vested legal interest to that of the government. (Appendix A-1).

Within the above procedural history of the case, the following recitation of facts is appropriate.

This case involved the conviction of Robin Warner, daughter of petitioners, in a narcotics-related conspiracy which began May 10, 1984 and the forfeiture of several pieces of Warner's property. Petitioners were not defendants in the underlying criminal case, nor did the evidence suggest participation on their part.

The record in the instant case reflects that in March of 1984, petitioner Horace Johnston, at Warner's request, purchased real estate located at 2128 Leonard Avenue, Columbus, Ohio, for use as a florist shop. Defendant Robin Warner had been operating this shop for a length of time. The original owner's decision to sell prompted Warner to approach petitioners, who had the ability to purchase the property and business. Horace

Johnston used $18,000.00 of his own funds for the down payment. The remainder of the $30,000.00 purchase price was mortgaged by Horace through the Home State Bank. The record further reflects that Horace paid the monthly mortgage payments of $265.18. Warner did reimburse Horace for approximately five (5) of the monthly payments herself, as well as occasionally assisting with the real estate tax obligations.

HOW THE FEDERAL ISSUES WERE RAISED AND DECIDED BELOW

As noted in the Statement of the Case, petitioners hold a fee simple title to the Leonard Avenue property. Horace testified that he routinely paid the monthly mortgage. He testified that he received about five payments from Warner. These five payments totalled approximately $1,325.00, a minuscule portion of the total payments made in the acquisition of the real estate.

The District Court held that the petitioners were unable to prove that they had purchased the property with their own money or that they paid the mortgage with their own money. The Court, therefore, concluded that the petitioners were nothing more than the nominal legal owners. The testimony by Horace that he had purchased the property with his own money, however, was never rebutted by the government. (Appendix A-2).

On appeal, the Sixth Circuit addressed the issue of whether the District Court properly ruled that the petitioners failed to prove their asserted interest in the 2128 Leonard Avenue property. (Appendix A-1). At page 5 of that opinion, the Court ruled:

> In the present case, the district court's findings that appellants lacked a superior right, title or interest in 2128 Leonard Avenue and that appellants were not bona fide purchasers for value must be affirmed by this court on appeal unless these findings are clearly erroneous. A finding is clearly

> erroneous only when "the reviewing court on the entire evidence is left with the defining and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). (Appendix A-1).

By applying the standard stated by the Sixth Circuit, it is unquestionable that the District Court did commit error. Uncontroverted evidence was presented that the petitioners were holders in fee simple of the property at issue. Furthermore, there was evidence of only five (5) contributory payments on the part of Warner. The District Court based its decision upon the fact that petitioners could not prove that they purchased the property. Again, petitioners hold the Leonard Avenue property in fee simple and no evidence was presented by the government to dispute this fact. The $18,000.00 down payment came from the life savings of petitioner, Horace Johnston, and the remaining amount was financed by note and mortgage through Home State Savings.

The Appellate Court concluded at p.8 that:

> "in spite of the fact that the deed was in their (Petitioners') names, because of their vague, conflicting and inconsistent testimony regarding the purchase and mortgage payments for the residence, Appellants failed to satisfy the burden imposed on them by 21 U.S.C. Section 853, to prove that they have a superior vested legal interest to that of the government." (Appendix A-1).

The Court held that the petitioners gave nothing of value and were only a nominee of the seller and not entitled to the protection of 21 U.S.C. Section 853(n)(6).

REASONS FOR GRANTING THE WRIT

In the present case, petitioner Horace Johnston used $18,000.00 of his own funds for the down payment, and mortgaged the remainder of the total $30,000 purchase price for the Leonard Avenue property. Title in fee simple was acquired by petitioners and they paid off the five year note and mortgage in 1989. No evidence was ever presented to indicate the down payment came from any other source but

Horace's own savings. Neither has the government offered any proof that all but five (5) payments totalling approximately $1,325.00 on an $11,000 mortgage came from Warner.

This is a forfeiture action under Title 21, U.S.C. Section 853. Under Section 853, the petitioners are entitled to relief from the government's interest so acquired via Warner if they can prove by a preponderance of the evidence that :

> A. the petitioner has a legal right, title or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> B. the petitioner is a bona fide purchaser for value of the right, title or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

1 U.S.C. Section 853(n)(6).

As noted, appellants have met this burden and proved a legal interest in the Leonard Avenue property superior to that asserted by the government. Pursuant to Subsection (A) of Section 853(n)(6), title was vested in the petitioners rather than the defendant and was superior to any right, title or interest of the defendant at the time of the commission of the acts which give rise to the forfeiture proceedings. The evidence is uncontroverted that petitioners purchased the property and acquired their title thereto prior to the commencement of the conspiracy period alleged in the criminal indictment.

Petitioners submitted into evidence the General Warranty Deed by which they acquired the Leonard Avenue property. Petitioner Horace Johnston signed a contract to purchase the property, and mortgaged property to secure the loan used to buy the Leonard Avenue property. Petitioners signed a note

to pay the mortgage and fully satisfied the terms of that mortgage. Petitioners hold a fee simple title; a title acquired prior to the criminal conduct of defendant Robin Warner.

Thus, the question presented to both the District and the Sixth Circuit Court and now to this Court, is whether state law applies in the determination of competing property interests between an innocent third party and the government under 21 U.S.C. Section 853 and, if so, whether the burden of proof shifts to the government to demonstrate a right "superior to" or "rather than" the petitioners?

The terms of Section 853(n)(6) require the Court to characterize the "legal . . . interest" which the petitioners now have in the property. U.S. v. Marks, 703 F.Supp. 623 (E.D. Mich. 1988). Since there is no general federal common law, Erie Railroad Co. v.

Tompkins, 304 U.S.64 (1938), a federal court applying Section 853 has no choice but to employ applicable state law when deciding the nature of the property interest. United States v. Yazell, 382 U.S. 341 (1966).

The issue of applying state law was addressed in U.S. v. One Single Family Residence, 894 F.2d 1511 (11th Cir. 1990). This case dealt with a forfeiture under 21 U.S.C., Section 881 where the petitioner and the defendant held the property as tenants by the entirety. It was argued by the government that if Florida law would not allow forfeiture of one-half the interest in the subject property, then Federal law should preempt the state law because the Florida law directly conflicted with the federal laws of forfeiture. Id. at 1514. The Court held that Congress did not intend the forfeiture statutes to preempt state law defining interests in land. Id. at 1517-20. The

Court held that any rule which subjected an "innocent" owner to forfeiture was contrary to Congressional intent because Congress intended full protection of the interests of innocent owners. Id. at 1518. Further, the Court held any possession by the government would amount to a taking without due process, violating the Federal Constitution. Id. at 1516.

Although the above case focused on the civil forfeiture provisions of 21 U.S.C. Section 881, the rights of third parties are subject to the same standard of proof under Section 853(n) as they are under Section 881(a)(7). That standard requires proof by a preponderance of the evidence. U.S. v. Marks, supra. There is no legal authority which would preclude applying the two sections in pari materia. Id.

It is state law that determines the interest the United States has in a

forfeiture proceeding against a property. U.S. v. Property in the Name of Alexander Morio Toki, 779 F.Supp. 1272 (D. Hawaii 1991). This Court concluded that, under Hawaii law, if one spouse owning property as a tenant by the entireties is an innocent owner, then the U.S. cannot obtain an interest in the property. Id. at 1284.

These two cases establish that the United States government cannot forfeit the petitioners' interest in the property if the petitioners were not involved in the criminal activity. The petitioners in the present action were clearly not involved in the criminal offense. Obviously, if the federal forfeiture statute does not apply to an innocent spouse in a tenancy by the entirety situation, then it cannot apply to an innocent fee simple holder. To allow the forfeiture of the Leonard Avenue property would be a taking without due process of law

which clearly violates the Fifth Amendment of the United States Constitution.

The Sixth Circuit had an opportunity to address this exact issue in U.S. v. Certain Real Property Located at 2525 Leroy Lane, 910 F.2d 343 (6th Cir. 1990). Ironically, the Court's 1992 decision in the petitioners' unreported case is completely contrary to this 1990 reported decision. The issue presented was the operation of the federal drug forfeiture statutes and dealt with the interests of an innocent spouse holding as a tenant by the entirety under Michigan law. The defendant used the subject property for the distribution of cocaine. The wife of defendant was found to be an innocent owner. In this case, the Sixth Circuit addressed the apparent clash of 21 U.S.C. Section 853(a) and (n). Subsection (a) provides that persons convicted of a felony drug offense shall forfeit his property "irrespective of

any provision of State law", used to commit the offense. However, the Court noted that Section 853(n) overrides whatever impact Section 853(a) might have on the status of state-created property rights. The Court held that property interests have long been acquired and defined by state law; it was with those in mind that Congress drafted provisions for the protection of innocent third parties. Id. at 348. The Court concluded that Congress' repeated use of clear language in Section 853(n) necessarily survives the "irrespective of State law" provision in Section 853(a). The provisions of Section 853(a) were never meant to restrict the property interests of an innocent owner. Id.

Obviously, state law does apply when determining the property interests of third parties under 21 U.S.C. Section 853(n). When Congress enacted 21 U.S.C. Section 853(a) to

provide for the forfeiture of property "irrespective of State law", it intended solely that state law offer no protection to the convicted defendant's interest in that property. Id. The Court declined to formulate a uniform federal rule of decision, and concluded that it was appropriate to refer to state law in determining the nature of the property interest claimed by a third party in forfeiture proceedings under 21 U.S.C. Sections 853(n) and 881(a)(7). Id. at 349.

The forfeiture statute at issue is concerned about title and ownership when it comes to the interests of innocent owners. U.S. v. Property in Name of Alexander Morio Toki, supra. Under Ohio law, the petitioners hold the Leonard Avenue property in fee simple absolute. Fee simple is an estate in land limited absolutely to a man and his heirs and assigns forever, without limitation

or condition. Guida v. Thompson, 160 N.E. 2d 153 (Common Pleas of Ohio, Tuscarawas County, 1957). Such an estate is unlimited as to duration, disposition, and decendibility. Id. at 157. Fee simple is a pure fee, the largest and most extensive interest that can be enjoyed in land. No person is capable of having a greater interest.

In the case at bar, it was found that the defendant used the Leonard Avenue property in connection with the offense. However, the petitioners were not found to be involved in this offense whatsoever. Petitioners are innocent owners of the Leonard Avenue property. The down payment for the property came from Horace's own savings. No evidence was ever presented to indicate any money was received from defendant Warner. Petitioners paid the monthly mortgage payments from their own money, except for approximately five (5)

payments which were from Warner for use of the property as a florist shop. These five (5) payments were received over a five (5) year period.

The petitioners were not convicted of the drug offense. The petitioners are innocent owners with a valid third party claim. Congress drafted 21 U.S.C. Section 853(n) for the protection of innocent third parties such as Horace and Maxine Johnston. Petitioners are, therefore, protected by State law.

Applying state law, petitioners have met their burden under Section 853(n)(6) by a preponderance of the evidence. Section 853 requires petitioners to prove that the legal interest which they assert in the Leonard Avenue property was theirs "rather than" the defendant's, or was "superior to" that of the defendant, as of the time of the offence which gave rise to forfeiture. It is

undisputed that at the time of the criminal acts which led to the forfeiture of Warner's interest in the property, Maxine and Horace Johnston held a fee simple deed to the Leonard Avenue property under Ohio law. Petitioners' fee simple ownership is obviously superior to that of the defendant and, therefore, superior to that of the government. Petitioners obtained the fee simple deed prior to the time of the offense which gave rise to forfeiture. This is because the interest was vested in the petitioners "rather than" and "superior to" the defendant at the time of the offense which gives rise to forfeiture.

Therefore, since local law applies when determining competing property interest under Section 853(n), does local law continue to impose the burden of proof on the petitioners once they have established a right "superior to" or "rather than" the defendants?

Clearly, the answer to this question must be no. Local law does not extend the burden of proof this far. Under Ohio law, a party claiming any interest against a fee simple owner must prove by clear and convincing evidence their superior title, an even greater burden of proof. Guida v. Thompson, supra. Local law recognizes the superior status of one holding title in fee simple. It cannot easily be taken away. Applying local law to the mandates of Section 853(n), once the petitioners established their fee simple ownership, the burden of proof must shift to the government to prove a superior right to the property.

This burden of proof was not met by the government. The only evidence presented by the government of the defendant's involvement in the Leonard Avenue property was a request by her to petitioners for the purchase of the shop; a shop which had been operating for

"twelve or thirteen years" prior to 1989. However, there is absolutely no evidence of the defendant's involvement in the purchase of nor any legal rights to the property. The defendant did not hold title to nor control the property. Clearly, the government failed to prove a superior right to the Leonard Avenue property.

In addition to the government failing to meet its burden of proof, it is well established by case law that, whenever possible, property disposition statutes must be construed so as to avoid a forfeiture of property. State v. Lillock, 434 N.E.2d 723 (1982).

Whenever forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise. US. v. Coin and Currency, 401 U.S. 715, 720-22 (1971).

Loss of possession under this case would unconstitutionally deprive petitioners of their right to due process of law. In order for a property disposition statute to be constitutional in its application, it must be rationally related to a legitimate state concern, such as deterring criminal activity. State v. Lillock, supra at 726. Petitioners were not involved in the criminal activity of Warner. The forfeiture statute cannot be exercised in an arbitrary, discriminatory, capricious or unreasonable manner. Sensenbrenner v. Crosby, 37 Ohio St. 2d (1974).

From the foregoing, it is apparent that the government has failed to meet the standard of proof necessary to cause the forfeiture of petitioners' property. A holding to the contrary ignores the fact that petitioners were and continue to be the persons solely liable for all aspects of the

Leonard Avenue property. Clearly, there can be no superior interest than that held by the petitioners. The forfeiture clause cannot, in good conscious be exercised against the petitioners without violating the Due Process Clause of the Fifth Amendment.

C O N C L U S I O N

To exorcise a viable minority business from a productive role in the community under these circumstances violates the most fundamental notions of fairness and and due process of these innocent owners. This writ should issue.

Respectfully submitted,

PAUL DENNIS PUSATERI

REGINA MARY GRENAUER
Counsel for Petitioners

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5(b), Rules of the Supreme Court, I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served on respondent United States of America by forwarding a copy to the office of its counsel, Kevin R. Conners, Assistant United States Attorney, 280 North High Street, Columbus, Ohio 43215.



PAUL DENNIS PUSATERI

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 91-3867

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

ROBIN RENE WARNER,

Defendant,

vs.

HORACE JOHNSTON;
MAXINE JOHNSTON,
Third Party
Petitioners-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Before KEITH AND SUHRHEINRICH, Circuit Judges; and
CONTIE, Senior Circuit Judge

PER CURIAM. Appellants, third party petitioners, Horace and Maxine Johnston, appeal the district court's order forfeiting real property at 2128 Leonard Avenue to the appellee, the United States, after the criminal trial of Robin R. Warner, defendant.

I.

On May 18, 1990, Robin R. Warner, daughter of appellant Maxine Johnston, and step-daughter of appellant, Horace Johnston, was convicted of a narcotics-related conspiracy which began May 10, 1984. Included in the indictment were five forfeiture counts. Count D involved the forfeiture of 2128 Leonard Avenue in Columbus, Ohio, known as Wildwood Florist Shop, the property at issue in this appeal. The jury returned a special verdict forfeiting Robin Warner's interest in 2128 Leonard Avenue.

Pursuant to 21 U.S.C. Sec. 853(n)(1), the United States published a notice of the order of forfeiture. Appellants filed a third-party petition with respect to 2544 Hignham Lane and to 2128 Leonard Avenue, which asserted that they were the owners of these properties.

On August 8, 1991, the district court held a hearing to determine whether appellants had a legally recognizable interest in the two properties. At the hearing, appellants presented evidence that they held legal title to 2128 Leonard Avenue in Columbus, Ohio. No evidence was presented to indicate the source of down payment for this property. Appellant Horace Johnston had testified previously at defendant's trial that he was the owner of the property located at 2128 Leonard Avenue, where his wife, Maxine, worked at Wildwood Florist Shop. He testified that in March 1984, it had been defendant Robin Warner's idea to purchase the property located at 2128 Leonard Avenue, which was the site of Wildwood Florists, a business owned and operated by his wife. He testified that a mortgage was obtained from Home State Bank and monthly mortgage payments of $265.18 were paid by him. In response to the question

"Did you get reimbursed for this?" he answered, "No. Some." He indicated he received some reimbursement from the flower shop which defendant Robin Warner would give to him, at times, in cash. When asked why defendant did not pay the mortgage payments directly to the bank, he answered, "I can't say that." He testified that he paid the taxes on the property for which defendant Robin Warner reimbursed him and that the mortgage had been paid off.

At the forfeiture hearing held on August 8, 1991, Horace Johnston testified that he purchased 2128 Leonard Avenue in 1984 for $30,000 and that he had obtained a mortgage loan of $11,000 to purchase the property. He alleged that he used $18,000 of his own money to purchase the property, that at the time he worked for the City of Columbus for $3 to $4 per hour, and that the $18,000 came from his savings. He characterized the money which he

had received from his step-daughter, Robin Warner, to pay the $265.18 monthly mortgage as rent and that he had received this amount from her five times. Under cross examination, he denied stating at trial that defendant Robin Warner had reimbursed him for the mortgage payments and for paying the taxes on the property. He conceded that when defendant gave him money, it was usually in cash.

Maxine Johnston, defendant Robin Warner's mother, testified that she'd worked for Wildwood Florists for 12 to 13 years and was the manager of the business, but did not have a set salary. She stated that she would take $800 per month in cash from the business to cover her bills. She paid no taxes on this money. She stated that she had no idea where the $18,000 came from that her husband used to purchase the property at 2128 Leonard Avenue. She also stated that she had no

knowledge of where he got the money to make the monthly mortgage payments for the property. She indicated that a $13,000 deposit in her account at the time she separated from her husband two years previously had come from savings.

By order of September 3, 1991, the district court denied appellants' third-party claims to the property. The court found that although Horace and Maxine Johnston were the record owners of 2128 Leonard Avenue because the deed was in their names, they were merely "straw owners" and the actual owner of the property was defendant Robin Warner. The court entered a final order of forfeiture from which appellants timely appealed.

II

We must decide whether the district court properly ruled that Horace and Maxine Johnston failed to prove their asserted interest in the 2128 Leonard Avenue property.

A district court's findings of fact in a forfeiture proceeding are subject to a *clearly erroneous standard* of reciew. United States v. 1977 Porsche Carrera, 946 F.2d 30, 33 (5th Cir. 1991); United States v. One 1987 Mercedes, 919 F.2d 327, 330 (5th Cir. 1990).

The property that is the subject of this appeal was criminally forfeitured to the United States pursuant to the provisions of 21 U.S.C. Sec. 853. Under the procedures set forth in that section, the district court may amend its order of forfeiture if a third-party petitioner can demonstrate by a preponderance of the evidence that:

> A. the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise

to the forfeiture of the property under this section; or

B. the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

21 U.S.C. Sec. 853(n).

In the present case, the district court's findings that appellants lacked a superior right, title or interest in 2128 Leonard Avenue and that appellants were not bona fide purchasers for value must be affirmed by this court on appeal unless these findings are clearly erroneous. A finding is clearly erroneous only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). Appellants claim that they have superior right, title or interest in 2128 Leonard Avenue because they are the record owners in

the deed of the property. The district court found, however, that despite this indicia of ownership, there was evidence that appellants Horace and Maxine Johnston were merely "straw owners" and that the proeprty had actually been purchased and the mortgage payments and taxes had been paid by defendant.

An examination of the record does not reveal the district court's conclusion to be clearly erroneous. Although Maxine, appellant Horace Johnston's wife, had operated a florist shop business at 2128 Leonard Avenue for "twelve or thirteen years" prior to 1989, Horace Johnston did not purchase the property until 1984 when his step-daughter, defendant Robin Warner, asked him to do so. This was the same year in which defendant's drug-related activities for which she was convicted began. The district court found that Horace Johnston's statement that he used $18,000 of his own money as a

down payment to purchase the property was not credible. This is borne out by the record as Johnston at the time made only $3 to $4 an hour and claimed that the money came from his savings, while his wife, Maxine Johnston, testified that she had no idea where the $18,000 used as a down payment came from.

The record also indicates that Horace Johnston gve conflicting testimony about who paid the taxes on the property. At defendant's trial, he testified that defendant reimbursed him for paying the property taxes at time. At the forfeiture hearing, he testified that he alone paid for the property taxes and denied that defendant reimbursed him.

The district court also found that Horace Johnton's statements about who paid the monthly mortgage payments were not credible because he made inconsistent statements about the payments. At the forfeiture hearing, Mr.

Johnston characterized the payments Robin Warner made to him for paying the mortgage as rent, whereas at defendant's trial, he had testified that he had been reimbursed by defendant five times for making the payments and did not know why she did not make the payments directly to the bank herself.

There was also testimony indicating Wildwood Florists was not a legitimately run business. Maxine Johnston testified that although she took $800 in cash each month from the cash proceeds of the business in order to pay her bills, she did not pay income tax on this amount. She also stated that she and defendant both wrote checks on her personal checking account although defendant was nor formally authorized to do so.

All of these facts support the district court's conclusion that although appellants Horace and Maxine Johnston were the record

owners of 2128 Leonard Avenue, they were in reality merely straw owners and that the property had actually been purchased and the mortgage payments and taxes had been paid by defendant. Appellants concede that the property was purchased at the request of and for the use and benefit of Robin Warner, the defendant. We believe the district court properly concluded that in spite of the fact that the normal indicia of legal ownership, the deed, indicated that appellants had a legal interest in 2128 Leonard Avenue, they were in reality nothing more than the nominal legal owners of the property.

In spite of the fact that the deed was in their names, because of their vague, conflicting, and inconsistent testimony regarding the purchase and mortgage payments for the residence, appellants failed to satisfy the burden imposed on them by 21 U.S.C. Sec. 853 to prove that they have a

superior vested legal interest to that of the government. See Braxton v. United States, 858 F.2d 650, 654-655 (11th Cir. 1988) (a purchaser of real property, who gave nothing of value for the property is nothing more than a "nominee" of seller and, therefore, not entitled to protection under Section 853). For these reasons, the district court is hereby AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

v. Case No. CR-2-90-12

ROBIN RENE WARNER

Defendant.

OPINION AND ORDER

This matter comes before the Court to consider the petition of Horace and Maxine Johnston -- the parents of this defendant, Robin Rene Warner -- to declare that they have a legally recognizable interest in two parcels of real estate, 2544 Hingham Lane and 2128 Leonard Avenue, both located in Columbus, Ohio. 21 U.S.C. Section 853(n). Any and all interest of the petitioners' daughter in these properties was criminally forfeited on August 9, 1990. 21 U.S.C. Sec. 853(a). On August 8, 1991, the Court held a hearing at which time both the government and

the petitioners presented evidence and testimony with respect to the Johnston's asserted interest. Upon consideration of the petitioners' claims, the Court finds that Horace and Maxine Johnston have failed to establish a superior legal interest in either the Leonard Avenue or Hingham Lane property. The forfeiture order shall stand as issued.

DISCUSSION

When an order of forfeiture has been entered under 21 U.S.C. Sec.853, a third party asserting a legal interest int he property may petition the court for a hearing to adjudicate the nature of his or her interest in the proeprty. 21 U.S.C. Sec. 853(n). At such hearing, it is the petitioner's burden to establish by a preponderance of the evidence that:

> (A) the petitioner has a legal right, title or interest int he proeprty, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the

> petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) The petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section.

21 U.S.C. Section 853(n)(6).

In determining whether the petitioner has a "legal right, title, or interest in the property," a district court may look to state property law, unless the "clear and

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The evidentiary standard only applies to factual determinations. To the extent the petitioner's interest in realty is a question of law, a district court cannot apply the command of section 853(n)(6) that the interest be established "by a preponderance of the evidence." United States v. Marks, 703 F.Supp. 623, 625 n.2 (E.D. Mich. 1988).

substantial interests of the national government" would "suffer major damage if the state law is applied." United States v. Certain Real Property at 2525 Leroy Lane, 910 F.2d 343, 347 (6th Cir. 1990). See also United States v. Marks, 703 F.Supp. 623, 625 (E.D. Mich. 1988) ("Since there is no general federal common law . . . a federal court applying section 853 has no choice but to employ applicable state law when deciding the nature of a property interest").

Although it is unclear from the language of the statute exactly what type of "legal right, title, or interest" Congress intended to include within the confines of the statute, the Sixty Circuit has attempted to clarify the congressional language. In United States v. Campos, 859 F.2d 1233 (6th Cir. 1988), the Court looked to the venerable Black's Law Dictionary for the definition of "vested interest":

> [a] present right or title to a thing, which carries with it an existing right of alienation, even though the right to possession or enjoyment may be postponed to some uncertain time in the future, as distinguished from a future right, which may never materialize.

Id. at 1238 (quoting Black's Law Dictionary 1402 (5th ed. 1979). Similarly, the Campos court looked to Black's for the definition of "vested": "Fixed; accrued; settled; absolute. Having the character or given the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent." Id. With these definitions in hand, the court asserted -- albeit in dicta -- that a "superior" interest would be "one in the nature of a lien, mortgage, recorded security device, constructive trust, valid assignment, or the like." Id. at 1239.

Thus, the determination to be made by this Court can be summarized as follows: the

government stands in the shoes of the defendant, Robin Warner, at the time she first began her criminal activity, and receives no greater interest than that which she was entitled to before the forfeiture of her entire interest. It is the petitioners' burden to prove that their asserted lgeal interest is superior to that asserted by the government via Robin Warner. The relevant date for this inquiry is May 10, 1984, the date on which the government alleges that Warner's conspiracy commenced. Because the government steps into the shoes of Warner on May 10, 1984, the inquiry is straightforward: as between the petitioners and Warner, who had superior title on May 10, 1984?

2128 Leonard Avenue

Both the testimony and the documentary evidence presented at the hearing establish

that the deed to this property is held jointly by the petitioners, Horace and Maxine *Johnston*. Pet'r Ex.6' Hr'g Tr. at 20-21. Additionally, the petitioners' remaining documentary evidence establishes that Horace signed a contract to purchase the property on Leonard Avenue, Pet'r Ex. 1, that the petitioners mortgaged the Leonard Avenue property to secure the loan used to buy the Leonard Avenue property, Pet'r Ex. 2, that the petitioners signed a Note promising to pay the mortgage company, Pet'r Ex. 3, and that the petitioners fully satisfied the terms of the mortgage, Pet'r Ex. 4. Thus, all the normal indicia of legal ownership points to the petitioners as having a "legal interest" in the property.

The government does not deny the petitioners' claim that all of the normal incidents of real estate ownership reside with the Johnstons. Rather, the government's

argument centers around the fact that Robin Warner allegedly reimbursed the Johnstons for their costs associated with the purchase of the Leonard Avenue property from the profits of her florist shop located on the same property. At the hearing, Mr. Johnston characterized the payments as "rent," Hr'g Tr. at 19, and claimed that he was not "reimbursed" by Robin Warner for his mortgage payments. Hr'g Tr. at 22, 23. However, at the trial one year earlier, Mr. Johnston characterized the payments as "reimbursement." Trial Tr. Vol. IV at 130. Furthermore, he admitted that he was reimbursed by Warner for the city and county property taxes that he paid on the property. Trial Tr. Vol. IV at 130-31.

The discrepancy in Mr. Johnston's testimony leads this Court to question his veracity as a witness. Because Mr. Johnston's personal interests were at stake in the forfeiture hearing, however, the Court credits his earlier trial testimony.

The fact that the petitioners have been unable to prove that they themselves purchased the property on Leonard Avenue with their own money, and that they alone paid the mortgage and taxes, coupled with the fact that the property was purchased at the request of, and for the use and benefit of, Robin Warner, Trial Tr. at 127-28, leads this Court to conclude that the petitioners are nothing more than the nominal legal owners of the property on Leonard Avenue. As such, they have failed to satisfy the burden imposed upon them by sec. 853 that they prove a superior vested legal interest. See, e.g., Braxton v. United States, 858 F.2d 650, 654 (11th Cir. 1988) (finding a purchaser of real property, who gave nothing of value for the property, to be nothing more than a "nominee" of the seller and, therefore, not entitled to protection under section 853); Michael Goldsmith and Mark Jay Linderman, Asset

Forfeiture and Third Party Rights: The Need for Further Law Reform, 1989 Duke L. J. 1254, 1286 n.136 ("it is also clear that a nominal title holder will not have standing to contest the forfeiture"); see also 91 Ohio Jur. 3d, Trusts section 215 ("[w]hen property is purchased in the name of one person and the consideration . . . is paid by another, a trust in the property results in favor of such other . . . ") (footnotes omitted); cf. United States v. Liscum Drive, 866 F.2d 213 (6th Cir. 1988) (nominal title holder lacks standingin civil forfeiture). Any other result would allow criminals to protect illegally obtained asset through the use of "straw men" and nominal title holders, thereby effectively defeating the manifest purposes of the criminal forfeiture statutes.

2544 Hingham Lane

The circumstances with respect to the

Hingham Lane property are essentially reversed. The petitioners do not dispute the government's contention that on May 10, 1984, Robin Warner held legal title to the property. Hr'g Tr. at 22, 34. Essentially, the petitioners assert that Maxine Johnston made payments upon the mortgage which produced equity in the property of approximately $4,300. They seek to have this Court recognize their $4,300 equitable interest in the Hingham Lane property.

The Johnstons' argument fails for two independent reasons. Initially, it must fail because the petitioners have failed to satisfy their burden of proof. As indicated above, the criminal forfeiture statute specifically requires third party petitioners to establish their legal interest in forfeited property by a preponderance of the evidence. 21 U.S.C. Section 853(n)(6). Here, not only are the petitioners only able

to establish an approximate dollar amount, they have also failed to establish, by a preponderance of the evidence, that the money used to pay the mortgage truly belonged to Maxine Johnston. Rather, because it was removed directly from the cash receipts of Robin Warner's florist shop, it appears equally as likely that the money belonged to Warner. This failure on the part of the petitioners to meet their burden is fatal to their claim. See United States v. Rockwell, 677 F. Supp. 836, 840 (W.D. Pa. 1988) ("Whether the absence of documentation is due to stupidity, neglect or an intentional effort to mislead, the burden falls on petitioners and they fail to satisfy it.")

Even if the Court were to accept as accurate the $4,300 amount asserted by the petitioners, and even if the Court were to accept that this amount accrued as a result of payments made by Maxine Johnston with her

own money, the claim would still fail. Both the clear language of the statute, and the interpretation of its meaning by courts and commentators alike, suggest that petitioners asserting a third party interest must allege more than an equitable interest. See, e.g., Campos, 859 F.2d at 1238 (noting that "legal title" is necessary); United States v. Mageean, 649 F. Suppl. 820, 828 (D. Nev. 1986), aff'd without opinion, 822 F.2d 62 (9th Cir. 1987) (citing legislative history); Goldsmith and Linderman, supra p. 6, at 1286 n.136 ("It is clear from the legislative history of RICO and [the criminal forfeiture statute] that the administrative remittance of mitigation procedures remain the exclusive basis for relief for claimants asserting equitable and not legal rights to the property.") Rather, petitioners asserting an equitable -- as opposed to a legal -- interest are confined to the

forfeiture statute's mitigation and remission procedure. Because the petitioners have failed to establish their Hingham Lane claim with reasonable certainty, and because they have failed to allege a legal interest in the property, their claim must fail.

WHEREUPON, upon consideration and being duly advised, the Court finds the Johnston's petition to amend the order of forfeiture to

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21 U.S.C. Sec. 853(i) provides:

> With respect to property ordered forfeited under this section, the Attorney General is authorized to --
>
> (1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section....

be without merit, and it is, therefore, DENIED. The forfeiture of both the Leonard Avenue and Hingham Lane property remains unaltered, and the Attorney General shall direct the prompt disposition of the property in compliance with the terms of 21 U.S.C. Section 853. The United States shall have clear title to both pieces of property, and may warrant good title to any subsequent purchaser or transferee.

IT IS SO ORDERED.

/s/ Joseph P. Kinneary

UNITED STATES DISTRICT JUDGE

No. 91-3867

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. O R D E R

ROBIN RENE WARNER

Defendant-,

v.

HORACE JOHNSTON;
MAXINE JOHNSTON,

Third Party Petitioners-Appellants

BEFORE: KEITH and SUHRHEINRICH, Circuit Judges; and CONTIE, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the

petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

21 UNITED STATES CODE SECTION 853(n)(6)

A. the petitioner has a legal right, title or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

B. the petitioner is a bona fide purchaser for value of the right, title or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;